



## BRIEF IN SUPPORT OF PETITION.

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### **Opinions Below.**

No opinion was rendered by the District Court in this case.

The opinion of the Circuit Court of Appeals was handed down on September 17, 1945, and has not yet been officially reported. It appears on pages 67 to 75 of the Record.

### **Jurisdiction.**

The jurisdiction of this court is invoked under section 240(a) of the Judicial Code, as amended, 28 U.S.C. § 347(a).

### **Statement of the Case.**

The basic facts have been summarized in the foregoing petition.

### **Specification of Errors.**

The errors assigned (R. 64-65), upon numbers 1 and 2(b) of which the petitioners rely, raise in substance the issues set forth under "Questions Presented" in the foregoing petition, and in addition the question whether the trial court committed prejudicial error in admitting in evidence the copies of contract between the United States and the Shipyard.

### **Summary of Argument.**

#### **I.**

The statute, 18 U.S.C. § 80 (Criminal Code, Section 35 (A)), does not include within its scope the presenting

of a false claim to a corporation other than one which is both an instrumentality of the United States and in which the United States is also a stockholder.

The literal wording of the statute so indicates, speaking only of the United States, or any department thereof, or any corporation in which the United States is a stockholder.

It was not the intention of Congress to include within the scope of the statute a private corporation, such as the Shipyard, whose only relationship with the United States is by virtue of a contract to do work for the United States. *Salas v. United States*, 234 Fed. 842 (C.C.A. 2, 1916). *United States v. Lowe*, 141 F. (2d) 1005 (C.C.A. 5, 1944). Report of Committee on the Judiciary of the House of Representatives on bill S. 3470. Amendment to Section 35 of the Criminal Code, 65th Congress, Second Session. House of Representatives Report No. 668. See *United States v. Walter*, 263 U.S. 15 (1923).

A judicial enlargement of a criminal act by interpretation such as here contended for by the government violates the fundamental common-law principle that crimes must be defined with definiteness. For that reason this court has declined so to interpret a parallel provision of the Criminal Code, 18 U.S.C. § 76. *Pierce v. United States*, 314 U.S. 306 (1941).

Moreover, where a federal statute creates offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute. It should be borne in mind that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution although a state conviction based on the same acts has already been obtained. *Jerome v. United States*, 318 U.S. 101, 104-105 (1943).

## II.

In prosecution of a crime requiring as an essential element specific personal knowledge on the part of the defendant, the jury should not be permitted to infer such knowledge from an assumption of a "general knowledge" of a "fact" not based upon evidence, and of which the court itself could not have taken judicial knowledge. To do so is to permit suspicion and conjecture to take the place of evidence.

## III.

There is not a criminal conspiracy to defraud the United States where the immediate and direct object of the unlawful agreement is not the United States but the Shipyard, a private corporation in which the United States holds no stock, and where the United States may suffer only as a probable consequence of the operation of the unlawful agreement against the Shipyard. The rule as to criminal liability is not the same as that applied in a civil case. See opinion of Mr. Justice Learned Hand in *United States v. Peoni*, 100 F. (2d) 401, 402 (C.C.A. 2, 1938).

### **Argument.**

#### I.

The statute, 18 U.S.C. § 80 (Criminal Code, Section 35 (A)), does not include within its scope the presenting of a false claim to a corporation other than one which is both an instrumentality of the United States and in which the United States is also a stockholder.

The literal wording of the statute so indicates, speaking only of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder. The Shipyard is not the United States, nor any department thereof, nor a corporation in which the

United States is a stockholder. It is a private corporation whose only relationship with the United States is by virtue of a contract to do work for the United States.

Congress did not intend to include such a corporation within the scope of the statute. Prior to the amendment of October 23, 1918, the statute did not include the phrase "or any corporation in which the United States of America is a stockholder." Under the statute as it then read, a prosecution for conspiracy to defraud the United States was undertaken against a defendant who had presented false claims to a railroad corporation the capital stock of which was wholly owned by the United States. It was held that the conspiracy was one to defraud the corporation, not the United States, and was not within the scope of the statute. *Salas v. United States*, 234 Fed. 842 (C.C.A. 2, 1916).

Thereafter, by Act of October 23, 1918, C. 194, 40 Stat. 1015, Congress amended the statute by including therein an offense against "any corporation in which the United States of America is a stockholder."

"... it was enacted after Congress contemplating the possibility of the war that ensued had authorized the formation of the Fleet Corporation under laws deriving their authority from earlier statutes of the United States. We are not informed whether at that time the United States owned stock in corporations other than the instrumentalities created with reference to the needs of that war, but we cannot doubt that the act was passed with a special view to them." *United States v. Walter*, 263 U.S. 15 (1923).

It is evident from the Congressional Committee report on the proposed amendment of the statute that Congress felt that such corporations were not encompassed within the provisions of the statute as it then stood, and that its

purpose in amending the statute was to bring such corporations within its scope.\*

The case of *United States v. Walter*, 263 U.S. 15 (1923), interpreted this amendment. That was an indictment for conspiracy to defraud the United States and to commit an offense against the United States by making and presenting for payment a fraudulent claim against the United States Emergency Fleet Corporation, a corporation formed under the laws of the District of Columbia, of which the United States owned all the stock. A demurrer was sustained by the District Court on the ground that the Act of 1918 must be taken literally as embracing any corporation in which the United States owned a single share of stock, and so construed went beyond the power of Congress. This court reversed the judgment, being of opinion that the Act of 1918 should be construed to refer only to corporations, like the Fleet Corporation, that are instrumentalities of the government and in which for that reason it owns stock.

From this history of the statute it would seem clear that prior to the Act of 1918 a conspiracy to defraud a private corporation, even though the United States owned all of its capital stock, was not within the scope of the statute; that by the Act of 1918 Congress intended to bring within its purview corporations, like the United States Emer-

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\*Report of Committee on the Judiciary of the House of Representatives on bill S. 3470. Amendment to Section 35 of the Criminal Code, 65th Congress, Second Session. House of Representatives Report No. 668, p. 2: "The amendments serve to fully re-enact and reinforce the provisions of section 35 of the Criminal Code so that it will include all the offenses heretofore contained therein and an offense against 'any corporation in which the United States of America is a stockholder' either as to the presentation of a false claim, a falsification of statements or representations, . . . against the United States, or of any department thereof, or any corporation in which the United States of America is a stockholder. . . ."

gency Fleet Corporation, that are instrumentalities of the government and in which for that reason it owns stock, and did not intend to include a private corporation in which the United States owned some stock.

It would seem to follow, therefore, that *a fortiori* Congress did not intend at any time to include a private corporation, not an instrumentality of the government, in which the United States owned no stock, and with which it had only a contractual relationship. *United States v. Lowe*, 141 F. (2d) 1005 (C.C.A. 5, 1944), so holds.

A judicial enlargement of a criminal act by interpretation such as here contended for by the government violates the fundamental common-law principle that crimes must be defined with definiteness. For that reason this court has declined so to interpret a parallel provision of the Criminal Code, 18 U.S.C. § 76. *Pierce v. United States*, 314 U.S. 306 (1941).

The *Pierce* case was an indictment for false personation of an officer or employee of the United States (T.V.A.) with intent to defraud, in violation of 18 U.S.C. § 76, Criminal Code, Section 32. The statute in effect at the time of the commission of the alleged offense did not speak of pretenses of acting under the authority "of any corporation owned or controlled by the United States," a phrase which was added by subsequent amendment. As stated by Mr. Justice Reed at page 311:

"These legislative extensions of the scope of the Act were in accord with the growing importance of the administrative corporation, but a comparable judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. . . . While the act should be interpreted 'so as . . . to give full effect to its plain terms,' . . . we should not depart from its words and context."

The court in the *Pierce* case made mention of the parallel amendment of the statute here in issue, saying, at page 312: "Another section of the Criminal Code (§ 35) was amended to meet the new development, by the Act of October 23, 1918, 40 Stat. 1015."

Moreover, where a federal statute creates offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute.

"Since there is no common law offense against the United States (*United States v. Hudson*, 7 Cranch, 32; *United States v. Gradwell*, 243 U. S. 476, 485), the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law. In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained." *Jerome v. United States*, 318 U.S. 101, 104-105 (1943).

## II.

In prosecution of a crime requiring as an essential element specific personal knowledge on the part of the defendant, the jury should not be permitted to infer such knowledge from an assumption of a "general knowledge" of a "fact" not based upon evidence, and of which the court itself could not have taken judicial notice.

To do so is to permit suspicion and conjecture to take the place of evidence.

## III.

There is not a criminal conspiracy to defraud the United States where the immediate and direct object of the unlawful agreement is not the United States but the Shipyard, a private corporation in which the United States holds no stock, and where the United States may suffer only as a probable consequence of the operation of the unlawful agreement against the Shipyard.

The rule as to criminal liability is not the same as that applied in a civil case. See opinion of Mr. Justice Learned Hand in *United States v. Peoni*, 100 F. (2d) 401, 402 (C.C.A. 2, 1938).

**Conclusion.**

It is respectfully submitted that this case is one calling for the exercise by this court of its appellate jurisdiction, and that to such end a writ of certiorari should issue to the Circuit Court of Appeals for the First Circuit.

Respectfully submitted,  
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**Appendix.****STATUTES INVOLVED.**

18 U.S.C. § 88 (Criminal Code, Section 37): "*Conspiring to commit offense against United States.* If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both."

18 U.S.C. § 80 (Criminal Code, Section 35 (A)): "*Presenting false claims.* Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."